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Supreme Court, U.S.
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No. 04-905

IN THE
Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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May 20, 2005

QUESTIONS PRESENTED

1. Whether Robinson-Patman Act liability may be imposed based on transactions in which the disfavored purchaser and the favored purchaser have not competed for the same business.

2. Whether Robinson-Patman Act liability may be imposed where the seller offers a price to a dealer in a competitive bidding situation and the dealer makes no purchase for that piece of business.

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This brief is submitted on behalf of the American Petroleum Institute ("API") as *Amicus Curiae* in support of the Petitioner.[1]

INTEREST OF AMICUS CURIAE

API, a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

API members face issues of compliance with the Robinson-Patman Act ("RPA") on a daily basis. Products such as gasoline and lubricants are distributed through networks of dealers and distributors. In establishing prices for customers, API members seek to comply with the provisions of the RPA and frequently seek counsel regarding RPA requirements. API members therefore have an interest in ensuring that judicial guidance in this area is well defined and consistent with the statute. A large number of the RPA cases decided by this Court and others involve the petroleum industry.

API has frequently participated on its industry's behalf in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the RPA. This case presents such issues. API believes that its participation as *amicus curiae* in this case will provide the Court with a broader perspective on the questions presented and will help to highlight the broad

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[1] Pursuant to Rule 37.6, counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, and its counsel made a monetary contribution to the brief's preparation or submission.

significance of these questions. Both parties have consented to API's participation, and the letters of consent are being submitted with this brief.

STATEMENT

Petitioner Volvo Trucks North America, Inc. ("Volvo") sells trucks through a system of dealers located throughout the United States. Respondent Reeder-Simco GMC, Inc. ("Reeder") is a Volvo dealer located in Fort Smith, Arkansas. Reeder sued Volvo, alleging price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. §13 ("RPA"). The jury found that Volvo had violated the RPA, and awarded damages. Petitioner's Appendix ("Pet. App.") 6a-7a.

The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a-32a. The majority held that Reeder had established the elements of an RPA violation. It rejected Volvo's argument that Volvo should not be held liable for price discrimination in competitive bidding situations where Reeder had failed to win the business and thus had made no purchase from Volvo. *Id.* at 10a-11a. The majority also concluded that Volvo could be held liable for price discrimination where Reeder claimed injury in connection with sales in which its competitor for the business purchased trucks from another manufacturer. Among other things, the majority found that Volvo intended to eliminate some dealers like Reeder and held that this constituted antitrust injury. *Id.* at 19a.

Judge Hansen concurred in part and dissented in part, concluding that Reeder had failed to make out a claim under the RPA. In his view, the majority had "attempt[ed] to fit a square peg into a round hole." Pet. App. 27a. Judge Hansen concluded that the RPA does not apply to competitive bidding situations, where there is only a single purchase, and

that there is no RPA violation where there is no injury to competition between Reeder and a favored purchaser. *Id.* at 27a-32a.

SUMMARY OF ARGUMENT

The decision below purports to be a routine application of settled law under the RPA, but it actually marks a broad and unprecedented expansion of that statute's scope. In the most troubling aspect of the opinion, the majority concluded that a seller may be held liable for an RPA violation based on price discrimination that had nothing to do with competition between favored and disfavored purchasers for a particular piece of business. In such transactions, Reeder (Volvo's customer) competed not against another Volvo dealer, but against a dealer who purchased from a different truck manufacturer. Thus, the alleged discrimination did not affect competition between Volvo dealers; the only effect was to reduce Reeder's profits.

The court of appeals' conclusion that such discrimination could form the basis for a finding of RPA liability is inconsistent with settled law. Until the decision below, the law was clear that price discrimination is not actionable under the RPA unless two customers are competing for the same business. If the requirement that the favored and disfavored purchasers compete for the same business is abandoned, serious practical problems will result. Under such an open-ended view of the statute, it would be difficult to counsel companies regarding what pricing conduct is legal and competition would suffer.

There is no basis for this Court to adopt such an interpretation. Neither the language of the RPA nor this Court's precedents support the court of appeals' reading of the statute. Nor does the legislative history support this

interpretation. The Court should reject such an unprecedented expansion of the RPA.

The Court should also reject the court of appeals' conclusion that RPA liability may be imposed where a seller quotes a price to a dealer engaged in competitive bidding and the dealer fails to win the business and thus makes no purchase. The statute is clear that there must be two purchases in order for price discrimination to be actionable. The Court should clarify that there can be no RPA liability in such competitive bidding situations.

ARGUMENT

API members are deeply concerned with RPA compliance and spend substantial time taking steps to ensure that their employees act within the boundaries the courts have established in this area. In devising pricing arrangements, oil companies have relied on settled RPA law. The decision below departs from settled law, abandoning limits on RPA liability that are firmly grounded in the statutory language and judicial precedent.

There is no basis for this departure from settled precedent. The Court should therefore reverse the decision below. In doing so, the Court should make clear that in secondary line cases (1) RPA liability may be imposed only in connection with transactions where the favored and disfavored purchasers have competed for the same business; and (2) RPA liability may not be imposed where the seller quotes a price to a dealer engaged in competitive bidding and the dealer fails to win the business and thus makes no purchase. These conclusions are consistent with the statute, with this Court's precedents, and with congressional intent. Such clear statements of the law would permit advisers to counsel with confidence when addressing pricing practices.

I. RPA LIABILITY SHOULD NOT BE IMPOSED WHERE THE FAVORED AND DISFAVORED DEALERS HAVE NOT COMPETED FOR THE SAME BUSINESS.

A. The Decision Below Departs from Settled Law.

Under the RPA, price discrimination alone is not enough to constitute a violation. There must also be injury to competition.[2] Until the decision below, it was clear that "[p]roving injury to competition at the buyer's level—secondary line injury—requires proof of competition between the favored and disfavored purchasers." I American Bar Association, Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 477 (5th ed. 2002) (citing cases). "Generally, the favored and disfavored customers must be in actual competition in the resale of the seller's commodity for a difference in price to have any likely competitive effect at the buyer level." Harry L. Shniderman & Bingham B. Leverich, PRICE DISCRIMINATION IN PERSPECTIVE § 207.e, at 61 (2d ed. 1987) (discussing possible exception where sales are to different functional levels).

Many courts of appeals have articulated this requirement. For example, in *Best Brands Beverage, Inc. v.*

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[2] Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987), the Second Circuit concluded that the wholesaler plaintiff had failed to make out an RPA claim because it did not establish that it had been in actual competition with a wholesaler in another territory. In concluding that the plaintiff had failed to prove the requisite likelihood of competitive injury resulting from the alleged discrimination, the court emphasized that a plaintiff must show that it was "engaged in actual competition with the favored purchaser(s) as of the time of the price differential" (*id.* at 584), and that there must be a showing of "competitive contact" between recipients of the price differential (*id.* at 585).

The Fifth Circuit has been even more explicit. In discussing the required showing of "competitive contact," that court explained that "'[o]nly if [the customers] are each directly after the same dollar are they competing.'" *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688, 692-93 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2881 (2004) (quoting *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975)). In *Infusion Resources*, the court concluded that the distributor had failed to prove an RPA violation, despite its claim that it was competing nationwide with the defendant's other distributors, since it had not shown "actual competition with a favored purchaser at the time of the alleged price discrimination." *Id.* at 693.[3]

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[3] *See also, e.g., M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975) (under the RPA, "'[c]ompetition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.'") (quoting *Ag-Chem. Equip. Co. v. Hahn, Inc.*, 350 F.Supp 1044, 1051 (D. Minn. 1972), modified on other grounds, 480 F.2d 482 (8th Cir. 1973)); *Lupia v. Stella d'Oro Biscuit Co.*, 586 F.2d 1163, 1171 (7th Cir. 1978) (plaintiff who claimed he lost sales in town where another distributor had a better (continued...)

Based on these and other decisions, sellers have understood that they generally may compete by offering selective discounts to customers in different geographic regions without fear of liability. They could offer different prices to customers who were bidding on different contracts. With some limitations, they could offer discounts to customers at separate functional levels. In other words, they could compete by discounting selectively so long as the favored and disfavored customers were not competing for the "same dollar."

Were the Court to affirm the decision below, these well-established limits on RPA liability would disappear and competition would suffer. In affirming the judgment of the district court, the court of appeals embraced a reading of the RPA under which a seller may be held liable on the ground that a disfavored purchaser lost sales or profits not to a favored purchaser, but to a dealer that did not purchase from that seller. In the four purchases that Reeder made from Volvo and that the court of appeals cited as a basis for imposing RPA liability, Reeder did not compete with another Volvo dealer for the business. Rather, it competed only with a non-Volvo dealer. Reeder had already successfully bid for the sale to its customer, and Volvo's allegedly discriminatory prices did not cause Reeder to lose that sale—either to another Volvo purchaser, or to anyone else. The only impact of the allegedly higher price that Reeder paid was that it earned less profit than it would have had Volvo offered a lower price.

The court of appeals also cited situations in which Reeder lost sales to a non-Volvo dealer, allegedly because

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discount could not show an RPA violation since he could not show sales he actually lost due to price discrimination).

Reeder did not receive a discount Volvo granted to another Volvo dealer in connection with a different sale. Again, there was no competition between two Volvo dealers for the same business. The two allegedly discriminatory prices were offered in connection with different transactions. In other words, the favored and disfavored Volvo dealers were not competing for the "same dollar."

The practical result of this interpretation of the RPA is to create great uncertainty for sellers. Before the decision below, sellers could be comfortable competing by charging different prices to dealers, so long as it was clear that those dealers were not competitors for the same business. If the decision below were affirmed, however, a seller would face the prospect that pricing will be found to violate the RPA if a plaintiff can show that another dealer received a lower price in a different transaction, even when the two dealers did not compete for the transaction at issue. There would be no clear boundaries to potential liability. Under the court of appeals' view of the statute, a jury could find an RPA violation based on a discount the seller granted to a dealer in a distant location, even if the favored and disfavored dealers never actually pursued business from the same consumer. A seller could no longer rely on identification of separate geographic markets, concluding, *e.g.*, that a selective discount to a dealer hundreds of miles away from other dealers was likely to be lawful. In effect, RPA liability would be open-ended, it would be difficult to provide meaningful guidance that would allow sellers to avoid liability, and competition would suffer.

Our concern about this unwarranted and open-ended expansion of RPA liability is magnified in light of the court of appeals' treatment of the requirement that the defendant's sales to the plaintiff and the favored buyer must be reasonably contemporaneous. In the past, this principle has helped to ensure that RPA liability is confined to situations in which the discrimination actually limits competition between

favored and disfavored purchasers for the same resale business.[4] Here, however, the court of appeals was willing to accept sales that took place months apart as evidence of price discrimination.[5]

This treatment of the evidence reinforces our concern that expansion of the RPA beyond situations in which favored and disfavored purchasers compete for the same business would have a particularly detrimental effect in industries, such as the petroleum industry, where there are

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[4] *See, e.g., Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389-90 (10th Cir. 1985) (because two purchases were not contemporaneous, plaintiff could not establish that the two purchasers competed with each other); William C. Holmes, ANTITRUST LAW HANDBOOK § 4:3 (2004).

[5] The "evidence" of price discrimination the court cited includes the following: (1) Volvo gave Reeder a 9% concession in March 1998, compared with a 12.3% concession to another dealer in January 1998; (2) Volvo gave Reeder a 19% concession in February 1997, compared with a 21% concession to another dealer in November 1997; (3) Volvo gave Reeder a 24.2% concession in November 1996, compared with a 27.3% concession to another dealer in February 1997; and (4) Volvo gave Reeder a 13.27% concession in February 1996, compared with concessions to other dealers of 18.04%, 15.42%, and 14.53% in, respectively, September 1996, April 1996, and February 1996. *See* Pet. App. 5a-6a. The court found such prices to be discriminatory even though Volvo produced evidence that market conditions changed from month to month. *See id.* at 14a.

If sellers in the petroleum industry must fear RPA liability not only when they charge different prices at the same time, but also when they make sales separated by weeks or months, they will undoubtedly be more reluctant to adjust prices in response to market conditions. *See* 14 Herbert Hovenkamp, ANTITRUST LAW ¶2313a (2d ed. 1999) ("Sudden changes in demand, supply, or costs often affect the market price, sometimes dramatically, and a sale made before such a change occurs should not be paired with a sale made after such a change. To do so would seriously limit sellers' ability to respond to changing market circumstances.").

frequent market fluctuations. Sellers in these businesses must be able to increase and decrease prices to respond to rapid changes in the market, including movements in the cost of inputs and volatility at the retail level. In the gasoline business, for example, sellers face daily (and even more frequent) changes in the price of oil, based on many factors. "In a tight world oil market, even small changes in supply or demand have been known to have a dramatic impact on prices." And "[t]he changes we have seen over the past year – attributable to instability in some key oil producing regions, bad weather and continued high demand – have been far from small."[6]

In order to compete vigorously and successfully, a broker in such a business must respond quickly, adjusting its prices in different geographical areas as conditions change. Likewise, gasoline suppliers must be able to react quickly to localized needs of retailers, who operate in the context of frequent changes to market conditions, including continuous, transparent price adjustments reflected on highly visible price signage. Particularly in view of the court of appeals' willingness to accept sales that took place months apart as evidence of price discrimination, its unprecedented interpretation presents an especially significant threat for sellers that must respond to frequent market changes.

[6] American Petroleum Institute, *FYI on Gasoline* (Apr. 13, 2005), *at* http://api-ec.api.org/filelibrary/FYI%20gasoline%204-13-05.pdf.

B. There Is No Legal Basis for Expansion of RPA Liability Beyond Transactions in Which Favored and Disfavored Purchasers Have Competed for the Same Business.

The reading of the RPA embraced by the court of appeals lacks a basis in the statutory text, this Court's interpretations of the RPA, or the legislative history. Expansion of RPA liability beyond transactions in which favored and disfavored purchasers compete for the same business should be rejected.

1. The Text of the RPA Does Not Support Such an Expansion.

The text of the RPA does not support imposition of liability on a seller based on transactions in which the plaintiff was not competing with a favored purchaser for the same business. The statute makes it illegal to engage in price discrimination "where the effect of such discrimination may be *substantially to lessen competition* or tend to create a monopoly in any line of commerce, or *to injure, destroy, or prevent competition* with any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a) (emphasis added).

By its terms, then, the statute requires a harm to competition, not just harm to a purchaser. Where alleged discrimination between two purchasers does not affect any transaction in which they are in competition for the same business, there can be no harm to competition. Moreover, the final clause of the quoted text refers to competition with a person who grants or "receives the benefit of [the] discrimination." On its face, this language does not apply to situations where the favored purchaser was not competing with the plaintiff for a piece of business.

2. This Court's Precedents Do Not Support Such an Expansion.

This Court's prior interpretations of the RPA do not provide support for reading the statute to cover situations in which the favored and disfavored purchasers are not competing for the same business. The Court has previously found violations of the RPA in secondary line cases only when the price discrimination involved purchasers from the same seller who were competing for the same business.[7]

In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), the Court held that the defendant, a producer of salt, violated the RPA because it offered discounts only to those wholesalers and retailers that purchased a certain quantity of salt. The Court observed that the "quantity discounts on Blue Label and on other table salts were enjoyed by certain wholesalers and retailers *who competed with* other wholesalers and retailers to whom these discounts were refused." *Id.* at 42 (emphasis added). The RPA violation was compounded

[7] In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a primary line injury case, the plaintiff alleged that the defendant cigarette maker had introduced its own brand of generic cigarettes and had sold them below cost and offered selective rebates to certain wholesalers. The defendant had introduced these price cuts to match the prices of a competitor cigarette maker. The Court held that the defendant was entitled to judgment as a matter of law, emphasizing that "the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *Id.* at 220. Indeed, "Congress did not intend to outlaw price differences that result from or further the forces of competition." *Id.* This case – which demonstrates how far a court can stray from the traditional bounds of RPA liability – presents an appropriate occasion for the Court to make similarly clear that a plaintiff in a secondary line injury case must demonstrate that price discrimination has a detrimental effect on competition (not merely on competitors).

because "special allowances were granted certain favored customers *who competed with* other customers to whom they were denied." *Id.* (emphasis added). The Court reiterated that "competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the *competitors of these customers*." *Id.* at 50 (emphasis added).

In *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963), the Court applied the RPA to circumstances in which price discrimination affected competition between purchasers. The defendant gasoline company had offered a price break to one of its retailers so that the retailer could match the price cut of a competitor selling a different brand of gasoline. However, the defendant had not offered an equivalent discount to its other retailers who operated in the same region and competed with the favored retailer for the same business. There was evidence that some of the retailers who did not receive the discount had lost some of their customers to the favored retailer. *Id.* at 510. In holding that the defendant should be held liable under the RPA, the Court highlighted that the injury arose to "the nearby . . . dealers *competing* with [the favored dealer]" as a result of the price concessions. *Id.* at 518 (emphasis added).

The Court in *Sun Oil* warned against defining "competitor" so broadly as to deprive the term of all meaning and deter pro-competitive price discrimination. The defendant had argued that "in order to eliminate the possibility of having even a broad price cut deemed illegal under [the RPA], it would of necessity have to extend the benefits of the concessions to all of its dealers in an unwarrantedly wide geographic area, perhaps nationwide." *Id.* at 526. But the Court reassured the defendant that "[t]he mere existence of a competitive continuum . . . does not require that market limits be indefinitely extended with

absurd results in the form of unwarranted nationwide or otherwise overly broad measures of competitive impact." *Id* at 526-27. Rather, the RPA demands "realistic appraisals of relevant competitive facts" so as not to outlaw selective discounts that have no real effect on intrabrand competition. *Id.* at 527.

Further, in *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court considered an RPA claim against a brewery that sold its beer more cheaply to its Kentucky wholesaler than to its Indiana wholesaler. There was evidence that customers living in Indiana purchased beer in Kentucky, so that the two wholesalers competed for the business of the same consumers. *Id.* at 433. The Court applied the "meeting competition" defense and remanded for determination of whether the defendant lowered its price in Kentucky to meet the equally low price of a competitor brewery. Before doing so, however, the Court reiterated that an RPA plaintiff must demonstrate "a reasonable possibility that a price difference may harm competition." *Id.* at 434-35.

In *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990), Texaco sold gasoline to retailers in Spokane, Washington, at its retail tank wagon prices, while granting substantial discounts to two distributors located in Spokane. Both of the distributors supplied gasoline to independent stations located in Spokane and also sold gasoline directly to consumers. *Id.* at 548-49. There was evidence that Texaco executives believed that the dramatic growth of one of the distributors (during a period when the retailers were losing business) was attributable to the magnitude of the discount the distributor received. *Id.* at 551. The Court concluded that the discounts to the distributors constituted illegal price discrimination and that a presumption of adverse effect on competition was appropriate "[t]o the extent that [the distributors] competed with [the retailers] in the retail market." *Id.* at 570.

We are aware of no decision of this Court that even comes close to suggesting that the RPA could be applied to situations in which the favored and disfavored purchasers did not compete for the same business. Rather, this Court's RPA cases point in the opposite direction.[8]

In addition, where favored and disfavored purchasers have not competed for the same business, price discrimination does not result in antitrust injury. An antitrust plaintiff must establish an injury "that flows from that which made defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *see also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Here it is the difference in price between favored and disfavored purchasers that the RPA makes unlawful. But the injury Reeder allegedly experienced is a loss of profits—a result of the high price it paid, rather than of any difference from the price charged to another Volvo dealer. Reeder also claims to have lost sales, but again any such losses were to non-Volvo dealers; these losses might have resulted from the high purchase price Reeder paid, but

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[8] Moreover, recognizing the benefits of selective discounting, this Court has warned against expansive interpretations of the RPA. More than 25 years ago, the Court commented that "interpretations of the Robinson-Patman Act which extend beyond the prohibitions of the Act" may "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (internal quotations omitted). Among other things, the ability to reduce price selectively spares sellers from the Hobson's choice between price cuts for all and price cuts for none. "The empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all, for giving an across-the-board discount to all buyers is too expensive." 14 Hovenkamp ¶ 2340b1. The result is that all consumers end up paying higher prices.

not from any difference in the prices paid by Reeder and another Volvo dealer.

In order to have antitrust injury in a secondary line RPA case, there must be some prospect of diversion of sales involving buyers who are competing with each other. Where two dealers are competing for the "same dollar," the disfavored dealer suffers harm resulting from price discrimination if it loses that dollar of business. But where the disfavored dealer loses a piece of business to a dealer who buys from another seller, its injury does not result from any price discrimination subject to the RPA. That loss has no connection to the alleged violation and, thus, there is no antitrust injury.

The court of appeals, citing Volvo's plan to reduce the overall number of dealers in its distribution system, asserted that "the elimination of some dealers like [Plaintiff] . . . is precisely the type of injury the antitrust laws were meant to prevent." Pet. App. 19a. But we are aware of no evidence in the history of the RPA that Congress intended to constrain the ability of a supplier to limit the size or structure of its distribution network.

In other contexts, this Court has recognized that under the antitrust laws businesses may deal—and refuse to deal—as they see fit. When applying the Sherman Act, the Court has placed "a high value . . . on the right to refuse to deal with other firms." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). The Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998)

("The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.")

In view of the broad recognition of this principle under the Sherman Act, there is no reason to think that Congress would have abandoned it in the RPA by imposing liability where a supplier sought to limit the group of customers to which it would sell, without expressly noting such a change. In fact, Congress expressly provided in the RPA that nothing in the statute "shall prevent persons ... from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. § 13(a). [9]

3. The Legislative History Does Not Support Such an Expansion.

Courts that have interpreted the RPA to protect individual competitors—even when competition has not suffered—have typically relied on legislative history.[10] But the RPA's legislative history "has often been misread, or at least overread." 14 Hovenkamp ¶ 2342a. Congress intended the RPA to close loopholes that were interfering with existing antitrust laws, not to advance a new and different set of policies. The House committee report explained that "the antitrust-law legislation has been frequently violated with impunity, and has been inadequately enforced throughout much of the period since its inception; this has resulted in the

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[9] Indeed, it has long been understood that the RPA does not restrict refusals to deal. *See* Frederick M. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT §4.1, at 45-48 (1962).

[10] *See, e.g., Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 657 (9th Cir. 1997); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1533 (3d Cir. 1990); *see also Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1158 (D.C. Cir. 1988) (Mikva, J., dissenting).

control of large areas of the industrial field by great combinations and by monopolistic practices having neither legal nor economic justification." H. R. Rep. No. 74-2287, at 5 (1936). The focus was primarily on fostering competition in the marketplace, rather than on the economic health of customers. Congress enacted the RPA "to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting *trade and commerce* against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen." *Id.* at 3 (emphasis added).

But Congress stressed that the antitrust laws' overall purpose—promoting and protecting competition—would be unchanged. The Senate committee report explained that, "[w]hile the bill as now reported closes [some] dangerous loopholes, it leaves the fields of competition free and open to the most efficient ...." S. Rep. No. 74-1502, at 4 (1936). The House committee report instructed that "[t]here is nothing in [the RPA] to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions." H. R. Rep. No. 74-2287, at 17. Instead, the RPA preserved the "unhindered opportunity to demonstrate through efficiency, service, and low prices to the public [the] right to survival in business." *Id.* at 4-5.

When the committee reports did talk about preventing harm to individual competitors, they did so only to acknowledge that harm to competition often arises from harm to competitors. For instance, the Senate report explained that "the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the *larger general injury* result, and to catch the weed in the seed will keep it from

coming to flower." S. Rep. No. 74-1502, at 4 (emphasis added). This and other passages suggest that "Congress's concern was not with injury to . . . competitors for its own sake. Rather, it was because Congress believed that an injury to individual competitors was an essential prerequisite to injury to competitive conditions generally, and it wanted to reach such injury to competitive conditions before it had a chance to mature." 14 Hovenkamp ¶ 2342d.[11] Such history does not support, much less mandate, expansion of the RPA to situations in which favored and disfavored purchasers do not compete for the same business.

II. RPA LIABILITY SHOULD NOT BE IMPOSED WHERE THE POTENTIAL CUSTOMER MAKES NO PURCHASE.

API's members have long relied on another clear and consistent tenet of RPA jurisprudence: the "two-purchaser rule." By its terms, the statute applies only when the seller "discriminate[s] in price between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). This Court has confirmed the point, explaining that "no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination." *Bruce's Juices,*

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[11] Moreover, when specifically mentioning harm to competitors, the committee reports referred primarily to harm resulting from large purchasers' coercion of discounts from manufacturers. The House report warned, for instance, that "the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary." H. R. Rep. No. 74-2287, at 3; *see also Morton Salt*, 334 U.S. at 43 ("The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.").

Inc. v. American Can Co., 330 U.S. 743, 755 (1947). And for nearly 70 years, the courts have reiterated that

> The discrimination in price . . . must be practiced "between different purchasers". Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the [plaintiff] contends.

Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939).

As the instant case illustrates, the two-purchaser requirement has particular application where prospective purchasers have themselves bid for sales to third parties. When multiple dealers are bidding for the business of the same customer, there is—by definition—only one dealer who will win the business and purchase the supplier's product to fulfill that commitment. API members that offer products in competitive bidding situations have relied on the virtually unanimous view of the courts that sales to successful bidders and offers to unsuccessful bidders fall outside the RPA. Until the decision below, "a sale at one price plus either an offer to sell at a higher price or a refusal to sell at any price [was] generally thought not to violate the Act." *Fusco v. Xerox Corp.*, 676 F.2d 332, 335 (8th Cir. 1982).

The court of appeals disregarded this principle. Reeder and another Volvo dealer sought to win a bid from a retail purchaser; Reeder's competitor won the bid; and Reeder alleged that Volvo gave the competitor a better price than it offered to Reeder. Because it had lost the bid, Reeder

never purchased the trucks from Volvo—at best Reeder merely *attempted* to purchase. But according to the court of appeals, because Reeder had purchased from Volvo on other occasions, it constituted a "purchaser" that could claim injury from transactions in which it did not purchase from Volvo. *See* Pet. App. 10a.

This sort of end-run around the RPA's two-purchaser rule contravenes settled law. *See Bay-City Abraham Bros. v. Estee Lauder, Inc.*, 375 F. Supp. 1206, 1218 (S.D.N.Y. 1974) ("[i]n defining a purchaser as referred to in [the RPA] care must be taken to distinguish between a purchaser, and one who is merely a past purchaser or a prospective purchaser"). In the competitive-bidding transactions, moreover, Reeder's alleged injury is not that it was forced to pay too high a price—because there was no sale, it paid no price. Rather, Reeder asserts that Volvo's allegedly discriminatory price *prevented* it from purchasing from Volvo. But the RPA "does not require a seller to create or to maintain a customer relationship with any buyer or prospective buyer." *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 294 (7th Cir. 1974) (Stevens, J.).[12] *Shaw's* itself—the case that set forth the "classic and accepted definition of the term 'purchaser'" (*Estee Lauder*, 375 F. Supp. at 1218)—ruled in favor of a seller who refused even to quote prices to its customer. 105 F.2d at 332.

Disregard of the two-purchaser rule not only expands the scope of RPA liability in a manner that directly contradicts the terms of the statute; it also creates particular

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[12] *See also, e.g., In re Bird & Son*, 25 F.T.C. 548, 553 (1937) (the RPA "does not purport to interfere with the right of a seller to select his customers. He may discriminate in the choice of his customers. Not until there is discrimination in price among *those chosen* does [the RPA] have any application.") (emphasis added).

problems when combined with the court of appeals' holding discussed in part I above. A seller that grants a discount to its dealer to help it fashion a winning bid for one contract may find it is liable under the RPA if a disappointed bidder for a *different* contract insists that it should have received the same discount. Even though the two dealers are not bidding on the same contract, and are thus not competing for the same business, the supplier might be held liable under the court of appeals' interpretation of the RPA. However, any injury to the disappointed bidder does not flow from a difference in the prices the seller offers to its dealers; at most, it results simply from the high price offered to the disappointed bidder. Again, there is no antitrust injury.

The two-purchaser requirement spares the courts from playing indeterminate guessing-games. As one court has explained,

> for a plaintiff to show injury under the act . . ., consummated transactions are needed so that concrete, non-speculative price comparisons are available. In contrast, preliminary bargaining or offering circular prices are of such a speculative nature that without actual sales as a measure, the Court would be burdened with unduly post hoc speculative economic analysis in an increasingly expanded number of cases.

Republic Packaging Corp. v. Haveg Indus., Inc., 406 F. Supp. 379, 381 (N.D. Ill. 1976). This case illustrates such concerns. In the transactions in which Reeder did not purchase from Volvo, the court of appeals simply assumed that Reeder's bid would have won the business if only Volvo had offered a lower price. That is far from clear, however, and in one case it appears to be demonstrably false: Volvo

did not offer Reeder's competitor a lower price until *after* the competitor had won its bid. *See* J.A. 352-53.

There is no basis for requiring such speculation. The Court should reject the court of appeals' disregard of the two-purchaser rule.

CONCLUSION

There is no basis—in the language of the statute, in the precedents of this Court, or in the legislative history—for expanding the RPA to cover transactions in which favored and disfavored purchasers do not compete for the same business. Nor is there any basis for discarding the two-purchaser requirement in the context of competitive bidding. The court of appeals' decision should be reversed.

Respectfully submitted,

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